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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ADITYA RAMACHANDRAN

Grievor

and

TREASURY BOARD
(Office of the Information Commissioner)

Employer

Indexed as
Ramachandran v. Treasury Board (Office of the Information Commissioner)

In the matter of an individual grievance referred to adjudication

Before: Adrian Bieniasiewicz, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Andrew Montague-Reinholdt and Adrienne Fanjoy, counsel

For the Employer: Larissa Volinets Schieven, counsel

Decided on the basis of written submissions,
filed March 15 and April 11 and 26, 2024.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] This grievance involves the calculation of a rate of pay upon promotion. Specifically, Aditya Ramachandran ("the grievor") grieves the decision of the Treasury Board ("the employer") not to use the 4% formula outlined in its *Directive on Terms and Conditions of Employment* ("the Directive") to determine his new rate of pay when he was promoted to an LP-02 (Law Practitioner Group, level 2) position. He asserts that because the salary for the position to which he was promoted is governed by performance pay, the employer should have applied the 4% formula rather than the formula based on the rate of pay nearest to the one that he was entitled to in his substantive position before the appointment, as specified in section 2.2.2.4 of the Directive.

[2] The employer argues that the salary of the LP-02 position is not governed by performance pay, and thus, the correct formula was used for calculating his rate of pay on promotion.

[3] For the reasons that follow, I agree with the employer and consequently deny the grievance.

II. Summary of the evidence

[4] The facts are uncontested and can be summarized as follows. At all material times, the grievor worked as a lawyer at the Office of the Information Commissioner of Canada. His substantive position was classified at the LP-01 group and level. He was subject to the LP collective agreement ("the collective agreement") between the employer and the Association of Justice Counsel ("the bargaining agent"). The collective agreement expired on May 9, 2022.

[5] In October 2018, the grievor was promoted to an LP-02 acting position, after which he was made a substantive LP-02 in December 2018. Before his promotion, he was at step 7 of 8 of the pay scale applicable to lawyers at the LP-01 level. His annual salary was $103 126. Upon his promotion, the employer placed him at step 1 of the LP-02 pay scale. The corresponding salary for this step was $109 108 per year, which constituted a 3.975% raise.

[6] Section A.2.2 of Appendix “A” of the Directive sets out the rates of pay on promotion, as follows:

> …
>
> *On promotion*
>
> *2.2.2.3 The appointment of a person described in Subsection 2.2.1 constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed exceeds the maximum rate of pay applicable to the person’s substantive level immediately before the appointment by one of the following measures:*
>
> *a. an amount equal to at least the lowest pay increment for the position to which he or she is appointed, when that position has more than one rate of pay; or*
>
> *b. an amount equal to at least 4 per cent of the maximum rate of pay for the position held by the person immediately before that appointment when the position to which he or she is appointed has only one rate of pay.*
>
> *2.2.2.4 Subject to subsections 2.2.2, 2.3.1 and 4.2.7, the rate of pay on promotion is to be the rate of pay nearest that to which the person was entitled in his or her substantive level immediately before the appointment that gives the person an increase in pay as specified in Subsection 2.2.3 above or an amount equal to at least 4 per cent of the maximum rate of pay for the position to which he or she is appointed when the salary for the position to which the appointment is made is governed by performance pay.*
>
> …

[7] Appendix “A” of the collective agreement sets out a lockstep pay system for lawyers at the LP-01 to LP-03 levels and provides a lockstep pay scale. According to the lockstep pay system, lockstep increments occur every 12 months, unless the lawyer’s performance is rated as “Unsatisfactory”, in which case they would not be eligible for a lockstep pay increment. This lockstep pay system replaced the former performance pay regime as of May 10, 2013, as far as lawyers at the LP-01 to LP-03 levels are concerned.

[8] Appendix “A” also establishes an in-range pay-movement system for lawyers at the LP-04 and LP-05 levels that outlines their salary ranges. Unlike lawyers at the LP-01 to LP-03 levels, their in-range movement (salary progression) is governed by the performance pay regime, as detailed in Appendix “C” of the collective agreement.

[9] Appendix "B" of the collective agreement sets out a performance pay plan for lawyers at the LP-01 to LP-03 levels. Under it, as of May 10, 2013, lawyers at those levels who reach the maximum of the lockstep salary range are eligible for a performance award in the form of a lump sum. The amount is determined by their performance rating. The performance award must be earned each year. Lawyers who received a performance rating of "Unsatisfactory" are not eligible for a performance award.

[10] Appendix "C" of the collective agreement sets out the performance pay plan for lawyers at the LP-04 and LP-05 levels. It is fully performance-based.

III. Summary of the arguments

A. For the grievor

[11] According to section 2.2.2.4 of Appendix "A" of the Directive, the grievor was entitled to a raise of at least 4% and should have been placed at step 2 of the LP-02 pay scale, with a corresponding salary of $114 237. Specifically, section 2.2.2.4 provides as follows:

> …
>
> *2.2.2.4 Subject to subsections 2.2.2, 2.3.1 and 4.2.7, the rate of pay on promotion is to be the rate of pay nearest that to which the person was entitled in his or her substantive level immediately before the appointment that gives the person an increase in pay as specified in Subsection 2.2.3 above or an amount equal to at least 4 per cent of the maximum rate of pay for the position to which he or she is appointed when the salary for the position to which the appointment is made is governed by performance pay.*
>
> …

[12] The grievor argues that although section 2.2.2.3 of the Directive defines what constitutes a promotion, section 2.2.2.4 outlines two approaches for determining pay upon promotion. One is based on the rate nearest to the one that would give an increase as specified in section 2.2.2.3. The second is the 4% rule.

[13] He further submits that article 15 of the collective agreement sets out a hybrid pay scheme for lawyers at the LP-01 to LP-03 levels. Specifically, they are entitled to their pay as set out in Appendix "A" of the collective agreement and a performance award paid under the performance pay plan outlined in Appendix "B". Given the multiple references to the performance pay plan that is applicable to these lawyers, the

ordinary and grammatical reading of article 15 demonstrates that they are governed by a performance plan. Notably, the sentence structure in clause 15.06 emphasizes the parallels between the pay structures applicable to lawyers at the LP-01 to LP-03 levels and those at the LP-04 and LP-05 levels.

[14] An examination of the words “salary” and “govern” used in section 2.2.2.4 of the Directive demonstrates the applicability of the 4% rule to lawyers at the LP-01 to LP-03 levels. The employer’s unreasonable interpretation of section 2.2.2.4 is contrary to its obligation under clause 5.02 of the collective agreement, according to which “[t]he Employer will act reasonably, fairly and in good faith in administering this agreement.”

[15] The word “salary” in section 2.2.2.4 of the Directive should be interpreted broadly. For example, *Black’s Law Dictionary* defines “salary” as “an agreed compensation for services”. This encompasses a base salary and performance pay. The French version of section 2.2.2.4 also supports a broad definition of “salary” (“salary” vs. “*rémunération*” in the French version). The equal-authenticity and shared-meaning rules that apply to interpreting a text that appears in both official languages support the grievor’s position. There is no indication on the record that the employer considered the French version of section 2.2.2.4, despite it being equally authoritative to the English version, and therefore, it contravened clause 5.02 of the collective agreement.

[16] The employer is obliged to interpret the word “salary” as it appears in section 2.2.2.4 in a manner that is consistent with how that word is used in the collective agreement. The interpretative tools indicate that performance awards, like those in Appendix “B” of the collective agreement, are part of the affected lawyers’ *rémunération* or salaries. To support his argument, the grievor refers to the definition of “*Rémunération*” in the Directive and the definition of “salary” in *Black’s Law Dictionary* and in two arbitration decisions from another jurisdiction.

[17] The grievor further argues that the way the word “salary” is used throughout the collective agreement indicates the parties’ intention that it be interpreted broadly. For example, using the words “basic salary” in clause 20.02 demonstrates that when the parties intended that “salary” be interpreted narrowly, they did so explicitly.

[18] Clause 12.1 of Appendix “B” of the collective agreement states that performance awards are part of salary before clarifying that performance awards will be counted for

the purposes of calculating a member's five-year average salary for pension purposes. Although clause 12.2 states that performance awards "… will … not be considered part of salary for the purposes of … salary calculations related to promotion …", this is to prevent a lawyer who received a performance award in a given year and was then promoted from then using the sum of their base salary and performance award in that year as the salary to which the 4% minimum raise would be added, to calculate the pay on promotion. This also demonstrates that when performance awards are to be excluded from salary, it is specifically mentioned.

[19] Finally, Appendix "E" of the collective agreement provides that for the purposes of retroactive payment calculations and administration, the elements of salary include, among other things, eligible allowances and supplemental salary (e.g., performance pay). This acknowledges that "performance pay" is an element of salary. The reasonable interpretation of section 2.2.2.4 suggests that the amounts discussed in Appendix "B" fall within the scope of the terms "salary" and "*rémunération*".

[20] The word "govern" in section 2.2.2.4 of the Directive should also be interpreted broadly. A performance pay plan as outlined in Appendix "B" does govern the salaries of lawyers at the LP-01 to LP-03 levels. The multiple clear references to the performance pay plan are sufficient to qualify the grievor and other lawyers at the LP-01 to LP-03 levels as being governed by a performance plan, even if he is also "governed" by a lockstep pay scheme. In *Saplys v. Ontario Association of Architects*, 2021 ONSC 2784 at para. 35, "govern" was defined as meaning "to have a controlling influence on something". This does not suggest that something has an **exclusive** controlling influence, but rather that it plays a determinative role on something.

[21] The grievor then referred me to the decision in *Pictou (District) School Board v. C.U.P.E., Local 867*, 1987 CarswellNS 604 at paras. 183 and 185 (in dissent), to support the argument that "govern" allows for two different schemes to govern simultaneously. In *Ontario Harness Horse Association v. Ontario Racing Commission*, 2002 CanLII 41981 (ON CA) at para. 43, "govern" was interpreted as involving the power to alter the existing legal landscape in some ways. The performance pay plan set out in Appendix "B" of the collective agreement has the power to alter the compensation of lawyers at the LP-01 to LP-03 levels.

[22] Should there be any ambiguity defining either "salary" or "governed", which is strictly denied, according to the principle of *contra proferentem*, the Directive's language will be construed against the employer's preferred interpretation, given that it drafted the ambiguous provision. In addition, despite having the opportunity, the employer did not clarify the application of section 2.2.2.4 in previous collective bargaining rounds. Had it meant for the 4% rule in section 2.2.2.4 to not apply to employees whose salaries were governed by two pay systems (a lockstep system and a performance pay system), it would have used words to that effect.

[23] Other portions of the collective agreement, including the "Pay Notes", do not contradict the grievor's position. Moreover, the wording in the Pay Notes is not relevant to interpreting whether the salaries of lawyers at the LP-01 to LP-03 levels are governed by a performance pay plan. The fact that the grievor's position is subject to a lockstep structure does not disentitle him from the 4% rule in section 2.2.2.4 of the Directive. The word "govern" does not suggest exclusivity. The lawyers at the LP-01 to LP-03 levels can be governed by both a lockstep and a performance structure.

[24] In terms of remedies, the grievor asks the Federal Public Sector Labour Relations and Employment Board ("the Board") to declare that the 4% rule in section 2.2.2.4 of the Directive applies to lawyers at the LP-01 to LP-03 levels, to retroactively place him at step 2 of the LP-02 pay scale as of October 2018, to adjust all subsequent movements through the pay scale, and to provide him with all the retroactive payments that he is owed.

B. For the employer

[25] The Board should follow the general principles of interpretation set out in *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17, and *Professional Institute of the Public Service of Canada v. Treasury Board*, 2019 FPSLREB 108, to guide its analysis of whether the LP-02 salary is governed by performance pay. A benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement. Moreover, s. 229 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") prevents the Board from rendering a decision that has the effect of requiring amending a collective agreement or an arbitral award.

[26] The grievor was properly placed at step 1 of the LP-02 scale upon his promotion, in accordance with section A.2.2 of Appendix "A" of the Directive. Section

2.2.2.3 is relevant to determining an employee's rate of pay upon promotion. Section 2.2.2.4 provides that the rate of pay on promotion is determined by reference to section 2.2.2.3, unless the position is "governed by performance pay." Since the LP-02 position has more than one rate of pay, and the salary is not governed by performance pay, the 4% rule is inapplicable. Consequently, the rate of pay upon promotion for the LP-02 position is determined by the formula set out in section 2.2.2.4, with reference to section 2.2.2.3(a) — "… an amount equal to at least the lowest pay increment …" for the LP-02 position.

[27] Article 15 and Appendixes "A" and "B" of the collective agreement set out the remuneration for lawyers at the LP-02 level. They establish that the LP-02 salary is governed by a quasi-automatic lockstep pay scale rather than by "performance pay". Lawyers who have reached the top of that scale and whose performance is assessed as "Fully Meets" or "Exceeds" are eligible for a lump-sum performance award, according to the performance pay plan set out in Appendix "B". This hybrid pay scheme does not establish that LP-02 lawyers' salary is "governed by performance pay". Appendices "A", "B", and "C" establish a clear distinction between the lockstep pay scheme governing lawyers at the LP-01 to LP-03 levels and the performance pay plan applicable to lawyers at the LP-04 and LP-05 levels.

[28] The LP-01 to LP-03 lawyers' salaries were governed by in-range performance increases until the new lockstep pay regime began in May 2013. Although lawyers at those levels are still eligible for performance pay once they reach the maximum of the lockstep scale, their salaries are no longer governed by performance pay.

[29] Only the salaries of lawyers at the LP-04 and LP-05 levels remain governed by performance pay. Appendix "A" sets only a range of pay, with in-range performance increases and awards outside that range based on performance for lawyers at those levels. Article 10 of the Pay Notes confirms that in-range movement within the ranges set out in Appendix "A" "… will continue to be governed by the performance pay regime in Appendix 'C'." In contrast, Appendix "A" creates a lockstep pay scale for lawyers at the LP-01 to LP-03 levels with quasi-automatic pay increments within that scale at a set date and a preset amount. Lawyers at the LP-01 to LP-03 levels and those at the LP-04 and LP-05 levels are governed by two distinct pay structures.

[30] The grievor's proposed interpretation of the word "govern" strips it of its ordinary meaning, which implies a controlling, determinative, or ruling influence. Although the word "govern" does not require exclusivity, it requires that the factor be a dominant influence. To be "governed" means to be controlled or ruled by, rather than to be somewhat impacted or influenced by in certain circumstances, as the grievor suggests.

[31] The lockstep salary scale in Appendix "A" controls, rules, or regulates the salaries of lawyers at the LP-02 level. The performance pay plan in Appendix "B" does not play a determinative role or a controlling influence. The definition of "performance award" in Appendix "B" confirms that LP-02 pay is governed by a "lockstep salary range" and is available only to an employee who reached the "maximum of the lockstep salary range" and who received a performance assessment of "Fully Meets" or "Exceeds". If a factor applies only in certain cases, it cannot reasonably be said to "govern". If the parties to the collective agreement intended for a factor to "govern", they said so.

[32] For example, in article 10 of the Pay Notes in Appendix "A", the parties agreed that in-range pay movement for lawyers at the LP-04 and LP-05 levels would "… continue to be governed by the performance pay regime at Appendix 'C'." There is no similar reference concerning lawyers at the LP-01 to LP-03 levels. Article 3 of Part 2 of Appendix "B" states that in-range increases that were to take effect on April 1, 2012, were "governed by" the performance pay plan; "[t]hereafter, in-range increases [are] in accordance with the lockstep salary ranges."

[33] Further, lump-sum performance awards payable on April 1, 2012, were "governed by this performance pay plan"; while effective May 10, 2013, only lawyers at the LP-01 to LP-03 levels whose salary was at the maximum of the lockstep pay range would continue to be eligible for lump-sum performance awards under the plan's terms. "Thereafter" denotes two distinct schemes. Since May 10, 2013, an LP-02 lawyer's salary has no longer been governed by performance pay but by the lockstep scale per Appendix "A".

[34] Although a performance award may fall within the scope of "salary" or "*rémunération*" for certain purposes, and according to clause 12.1 of Appendix "B" of the collective agreement, it is considered part of salary, it does not mean that an LP-

02's salary is governed by performance pay. The question is not whether performance pay is part of salary, included in salary, or considered salary. The issue is whether it can reasonably be said that the LP-02 position's salary is governed by performance pay. A performance award is not the factor that governs salary. Accepting the grievor's position would create inconsistencies within the collective agreement.

[35] In addition, clause 12.2 of the Appendix "B" provides that performance awards are not considered part of salary for the purposes of "… salary calculations related to promotion or transfer." While Appendix "E" of the collective agreement provides that performance pay is an element of salary that is included in retroactive calculations, it does not support that salary "is governed by performance pay". Rather, by explicitly including performance pay in such calculations, the parties recognized that performance pay is distinct from salary.

[36] Considering that there is no ambiguity in the definitions of either "salary" or "governed" in the Directive, as the grievor suggested, the principle of *contra proferentem* does not apply.

[37] The bargaining agent's position in this case is contrary to the position that it took in *Association of Justice Counsel v. Treasury Board*, 2015 PSLREB 78 ("*Association of Justice Counsel 2015*"). In that case, it argued in summary that as of May 10, 2013, the parties replaced the previous in-range performance pay scheme with a quasi-automatic lockstep pay-increase framework and moved away from the performance-pay-regime-increase framework, and pay increases are no longer calculated in accordance with the performance pay plan that had previously governed them.

[38] In *Association of Justice Counsel 2015*, the Board concluded at paragraph 100 that the parties had done the following:

> *[100] … shifted from the performance pay regime, based on an increase on performance assessment, to a lock step [sic] regime, which is a quasi-automatic progression at a set date at a pre-set [sic] amount. These changes, in no particular order, denote a significant change to that portion of the collective agreement as it relates to pay increases.*

[39] In *Cruceru v. Treasury Board (Department of Justice)*, 2021 FPSLREB 30, the bargaining agent also took the position that pay increments for lawyers at the LP-01 to LP-03 levels are automatic and argued that the words "is entitled" and "shall be paid"

at clauses 15.02 and 15.03 of the collective agreement confirm the "quasi-automatic status of the pay increments."

[40] Contrary to what the grievor asserts, the Pay Notes in Appendix "A" of the collective agreement are relevant to determining whether the LP-02 salary is "governed by performance pay".

[41] The employer did not breach clause 5.02 of the collective agreement, which does not require it to make a more generous interpretation than is unsupported by the collective agreement's clear language.

[42] As for the remedy, should the Board allow the grievance, given the time limits for filing one imposed by clause 24.12 of the collective agreement, and considering the Federal Court of Appeal's decision in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL), no remedy can be awarded for any period extending beyond the 25 days preceding the filing of the grievance. Moreover, the Board cannot declare that the 4% rule in section 2.2.2.4 of the Directive applies to all lawyers at the LP-01 to LP-03 levels, since this is not a policy grievance.

C. The grievor's rebuttal

[43] The fact that the performance pay scheme is triggered only for lawyers at the LP-01 to LP-03 levels who are at the top of their lockstep scales does not affect whether the salary is governed by performance pay. Once they are at the top of the lockstep scale, the determining factor in their salary becomes their performance pay.

[44] The *Association of Justice Counsel 2015* decision, in which the former Board adopted the bargaining agent's position, must be read in the context of determining whether lawyers on maternity or parental leave were eligible for the scheduled in-range lockstep increase. The grievor agrees with the predecessor Board's finding that in-range increases are governed by a lockstep pay scheme and therefore are not dependent on performance.

[45] In fact, the grievor takes no issue with the fact that pay-range increments, per the lockstep pay regime outlined in Appendix "A" of the collective agreement, are automatic (or quasi-automatic). This is irrelevant to the question of whether the salary for an LP-01 to LP-03 lawyer's position is governed by a hybrid pay scheme composed of both a lockstep pay scheme and a performance pay scheme.

[46] Concerning section 2.2.2.4 of the Directive, considering that the salary for positions at the LP-01 to LP-03 levels is governed by performance pay, the 4% rule applies. As for the Pay Notes, they do not discuss the details of Appendix "B", which contains the details of the performance pay scheme. Clause 15.06 of the collective agreement clearly states that the performance pay plan in Appendix "B" will apply to lawyers at the LP-01 to LP-03 levels.

IV. Reasons

[47] The only issue in dispute in this grievance is whether the salary for the position to which the grievor was promoted (i.e., LP-02) is governed by performance pay. If so, according to section 2.2.2.4 of the Directive, his rate of pay on promotion should have been equal to at least 4% of the maximum rate of pay of the LP-02 position. If not, the employer correctly calculated his pay increase on promotion in accordance with the formula set out in section 2.2.2.4.

[48] In essence, the grievor argues that given that the salaries for positions at the LP-01 to LP-03 levels are subject to a hybrid pay scheme composed of a lockstep pay scheme (Appendix "A") and a performance award calculated under the performance pay plan (Appendix "B"), the salary for the position to which he was promoted is governed by a performance pay plan. To support his argument, he submits that the word "salary", interpreted broadly, encompasses "performance pay", and that the word "govern", also broadly interpreted, means "to have a controlling influence on something" rather than an "exclusive" controlling influence. Considering that lawyers at the LP-01 to LP-03 levels are subject to the performance pay plan, the plan has a controlling influence on their compensation, and therefore, his salary is governed by performance pay. I disagree.

[49] The collective agreement provides comprehensive rules governing the salary and compensation-related matters of lawyers at the LP-01 to LP-03 levels, as well as the LP-04 and LP-05 levels, who are subject to the collective agreement. To determine the issue before me — namely, whether the salary for the LP-02 position is governed by performance pay — I must interpret the relevant collective agreement provisions in accordance with the rules of interpretation developed in labour law, while considering the legislative and jurisprudential constraints.

[50] According to those rules, the parties' intention is to be found in the collective agreement's express written provisions. Words are to be given their ordinary meaning and must be read in their entire context and in harmony with the scheme of the collective agreement. Effect must be given to every word. The parties are assumed to have meant what they said, and the same words are to be given the same interpretation (see *Professional Institute of the Public Service of Canada*, at para. 56, *Cruceru*, at para. 84, and *Nowlan v. Canada (Attorney General)*, 2022 FCA 83 at para. 46).

[51] However, the rules of interpretation are subject to legislative and jurisprudential constraints. According to s. 229 of the *Act*, I cannot interpret the collective agreement in a way that would have the effect of requiring amending it. The interpretation should not result in adding benefits to a collective agreement that the parties have not bargained for (see *Forbes v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 110 at para. 67). In addition, a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement (see *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at paras. 26 and 27).

A. Different and separate pay structures

[52] Lawyers at the LP-01 to LP-03 levels and lawyers at the LP-04 and LP-05 levels are subject to distinct and separate pay structures. Specifically, according to Appendix "A" of the collective agreement, the salaries of lawyers at the LP-01 to LP-03 levels progress in accordance with a lockstep pay system and are not performance-dependent. The increments are automatic or quasi-automatic. On the other hand, the salaries of lawyers at the LP-04 and LP-05 levels are subject to an in-range pay-movement structure that is fully governed by performance pay.

1. Lockstep pay increments for the LP-01 to LP-03 levels are not performance-based

[53] Pay increments for lawyers at the LP-01 to LP-03 levels are subject to a lockstep pay system. In regions outside Toronto, Ontario, the lockstep pay system includes eight steps for LP-01 and LP-02 positions, and six steps for LP-03 positions. Each step corresponds to a distinct, clearly defined salary to which a lawyer is entitled. The last step in the lockstep pay system corresponds to the maximum salary range for the position. The following table serves as an example to illustrate this:

LP-02 — May 10, 2018 (Appendix "A" of the collective agreement)

Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8
109,108	114,237	119,605	125,225	131,113	137,274	143,727	150,483

[54] For all practical purposes, salary progression within the lockstep pay system is automatic or at least quasi-automatic. Specifically, as long as a lawyer receives a performance rating of “Fully Meets”, their salary will automatically increase every 12 months to the next higher rate (next step) on the scale, until they reach the maximum salary specified. In other words, the lawyer’s performance level, whether rated as “Fully Meets” or “Exceeds”, with the exception of a performance rating of “Unsatisfactory”, has zero impact on the amount by which their salary will increment. Their salary will progress by the same amount. As such, these increases are not tied to the lawyer’s performance rating; rather, they are akin to a form of compensation linked to years of service. This is not in dispute.

[55] The grievor agrees with the finding that the Board’s predecessor, the Public Service Labour Relations and Employment Board, made in *Association of Justice Counsel 2015*, which was that in-range increases for lawyers at the LP-01 to LP-03 levels are governed by a lockstep system and therefore are not dependent on performance. The grievor further concedes in his reply that pay increments for in-range increases under the lockstep pay scheme are automatic or quasi-automatic and therefore are not based on performance.

[56] Indeed, in *Association of Justice Counsel 2015*, the bargaining agent argued among other things that as of May 10, 2013, the parties replaced the previous in-range performance pay scheme for annual salary increases with a lockstep pay-increase framework and that the pay increment model for lawyers at the LP-01 to LP-03 levels is no longer governed by a performance pay plan (see *Association of Justice Counsel 2015*, at paras. 46, 51 to 53, 58 to 60, 63, 85, and 88).

[57] The predecessor Board agreed. Specifically, it concurred with the finding in *Association of Justice Counsel v. Treasury Board*, 2012 PSLRB 32 at para. 37, which was that a pay increment, under the lockstep pay scheme, is a quasi-automatic progression that occurs at a set date by a preset amount. In contrast, in-range performance increases and performance awards outside that range are compensation to reward performance, not pay increments based on years of service. These are two different and distinct systems.

[58] In short, it is not in dispute that the pay increments under the lockstep pay system, as outlined in Appendix “A” of the collective agreement and applicable to lawyers in LP-01 to LP-03 positions, are not performance-based.

2. In-range pay movement for the LP-04 and LP-05 levels are performance-based

[59] By contrast, the salary progression of lawyers at the LP-04 and LP-05 levels is subject to a separate and distinct and entirely performance-driven pay structure. Put differently, their salary increases are contingent upon their performance. Unlike lawyers at the LP-01 to LP-03 levels, whose pay scales include predetermined salary increments at each step, the LP-04 and LP-05 pay scales do not have set steps with fixed increases. As illustrated in the following table, they have only a range of pay within which their salary progression is based entirely on performance:

LP-04

Effective date	Range
May 10, 2018	148,785 to 188,996

LP-05

Effective date	Range
May 10, 2018	172,494 to 211,040

[60] Moreover, the Pay Notes in Appendix “A” of the collective agreement specifically confirm that the salary progression for lawyers at the LP-04 and LP-05 levels continues to be governed by the performance pay regime in Appendix “C”. But this is also not in dispute.

B. Performance awards for lawyers at the LP-01 to LP-03 levels

[61] Appendix “B” of the collective agreement sets out a performance pay plan for lawyers at the LP-01 to LP-03 levels. Under the plan, only lawyers who have reached the top of the lockstep pay scale and whose performance was rated as “Fully Meets” or “Exceeds” are entitled to a performance award.

[62] Specifically, a lawyer at the top of the lockstep pay range will receive a lump-sum performance award equal to 4.6% of the maximum salary on the lockstep pay scale if their performance is rated as “Fully Meets”. A lawyer whose performance is

rated as "Exceeds" will receive a lump-sum performance award equal to 7% of their salary. A lawyer is not eligible for the performance award if they have not reached the maximum of the lockstep salary range or if they received an "Unsatisfactory" rating. The performance award must be re-earned each year.

[63] It is not in dispute that the amount of the performance award is performance-driven. The better the rating, the higher the performance award. What is in dispute is whether the overall salary for the position to which the grievor was promoted is governed by performance pay, given that the position is subject to the performance pay plan.

C. The employer acknowledges that a performance award is part of salary

[64] The employer acknowledges in its submissions that for the purposes of this case, a performance award under the performance pay plan is considered part of salary as provided in clause 12.1 of Appendix "B" of the collective agreement (see paragraph 76 of the Employer's submissions). Clause 12.1 reads as follows:

> ***12.0 Salary-related benefits***
>
> ***12.1*** *A performance award will be included as part of salary for the period in respect of which it was paid. Any such award paid in the year of retirement, but related to the year prior to retirement, will be fully counted in the calculation of the five-year average salary for pension purposes. However, it will not be reflected in the level of coverage under salary-related benefits such as Supplementary death benefit and insurances.*
>
> ***12.0 Avantages salariaux***
>
> ***12.1*** *Une prime de rendement fait partie du traitement pour la période à l'égard de laquelle elle est versée. Une prime de rendement versée l'année de la retraite, mais se rattachant à l'année précédant la retraite, est comptée intégralement dans le calcul de la moyenne du traitement sur cinq ans aux fins de la pension. Cependant, il n'en est pas tenu compte dans le calcul du niveau de protection au titre des prestations salariales comme la prestation supplémentaire de décès et les assurances.*

[65] However, it argues that this does not mean that the salary is governed by performance pay. Even if the collective agreement sets out a hybrid pay scheme for lawyers at the LP-02 level, it cannot be reasonably said that their salary is "governed by performance pay". According to the employer, the question is not whether performance pay is part of salary, included in salary, or considered salary. Rather, the

issue is whether, when interpreting the Directive and the collective agreement in their plain and ordinary meanings and in context, it can reasonably be said that the salary for an LP-02 position is governed by performance pay. It cannot. I agree.

D. The salary for an LP-02 position is not governed by performance pay

[66] I agree with the grievor that as acknowledged by the employer, his position is subject to a hybrid pay scheme composed of the lockstep pay system set out in Appendix “A” and the performance award payable under the performance pay plan outlined in Appendix “B”. However, given that the performance award constitutes a relatively small portion of the overall LP-02 salary (i.e., 4.6% or 7%), can it reasonably be argued that because the LP-02 position is subject to a hybrid pay scheme, the overall salary for that position is **governed** by performance pay? I do not believe so.

[67] The parties agree that the word “govern” does not require exclusivity. Their proposed definitions of “govern” are not significantly different. The grievor submits that word “govern” implies “to have a controlling influence on something” (see *Saplys*, at para. 35), “plays a determinative role on something”, or has the power to alter the legal landscape (see *Ontario Harness Horse Association*).

[68] The employer argues that “govern” “… implies a controlling, determinative, or ruling influence.” It further submits that according to the *Collins Dictionary*, “govern” is understood as “to be a predominant influence on (something); decide or determine (something)”. According to the *Merriam-Webster Dictionary*, “govern” means “to exert a determining or guiding influence in or over”. The *Oxford English Dictionary* defines “govern” as “[t]o exert a defining or controlling influence over (an action, process, or course of events); to dictate or determine (an outcome, development, etc.)”.

[69] Having considered the parties’ proposed interpretations of the word “govern”, I conclude that the term implies more than merely exerting a simple influence or impact (on something). I am of the view that it denotes a predominant or determinative control over the direction or outcome of something. It implies exerting a controlling influence over something. In my opinion, anything less would dilute the true meaning of the term “govern”.

[70] It follows that for the performance pay plan to govern the salary of the LP-02 position, it must have a significant or controlling influence on the lawyer’s overall

salary. Moreover, based on my understanding of the meaning of the word “govern”, I am of the view that the phrase in section 2.2.2.4 of the Directive, “… the salary … is governed by performance pay”, implies that the salary must be predominantly tied to performance pay for the 4% formula to apply. Applying the 4% to someone whose salary is overwhelmingly not performance-based contradicts the intent of the clause.

[71] Given my interpretation of the term “govern”, I agree with the employer that the performance award under the performance pay plan “… does not play a determinative role or controlling influence” on the salaries of lawyers at the LP-02 level and therefore does not govern the grievor’s salary. Put more simply, a performance award accounting for 4.6% to 7% of the total LP-02 salary does not play a determinative role or controlling influence on the salaries of lawyers at the LP-02 level.

[72] Between 93% and 95.4% of the total salary for the LP-02 position is governed by the lockstep pay scheme outlined in Appendix “A” of the collective agreement. It is not in dispute that the pay increments under that scheme are quasi-automatic and are not governed by performance pay. I agree with the employer that the lockstep pay scheme plays a predominant and determinative control over the salary of the position in question. It exerts a controlling influence on the salary to which the grievor has been promoted.

[73] I agree that the performance award can impact the grievor’s overall salary by increasing it up by 4.6% to 7%. However, this relatively small portion of the overall salary does not allow me to conclude that the salary as a whole is governed by performance pay. It cannot be reasonably said that the performance award, administered under the performance pay plan, has predominant or determinative control over the salary for the position in question or that it exerts a controlling influence on it. The performance pay plan governs the performance award, not the salary, which is predominantly governed by the lockstep pay scheme. To conclude otherwise would be misleading. Moreover, applying the 4% formula to someone whose pay is overwhelmingly not performance-based contradicts the intent of section 2.2.2.4 of the Directive and would distort its purpose.

[74] This interpretation is further supported by the French version of section 2.2.2.4 of the Directive, which reads as follows:

> *Sous réserve des articles 2.2.2, 2.3.1 et 4.2.7, le taux de rémunération payable au moment de la promotion sera le taux le plus proche du taux de rémunération auquel la personne avait droit à son niveau de titularisation immédiatement avant la nomination qui lui vaut une augmentation de rémunération tel que le précise l'article 2.2.3 ci-dessus ou un montant au moins égal à 4 % du taux maximal de rémunération pour le poste auquel elle est nommée, lorsque la rémunération du poste auquel se fait la nomination* ***est fondée*** *sur le rendement.*
>
> [Emphasis added]

[75] The word "fondé" is defined in French as to "have as a base or foundation" on something (*fonder quelque chose sur: établir sur (une base) – asseoir, baser*; from *Le petit Robert de la langue française 2006*). At the risk of being repetitive, and for the reasons outlined earlier, it cannot be said that the LP-02 salary is "fondé" on performance pay (*rendement*).

[76] While I am not bound by the *Ontario Harness Horse Association* decision cited by the grievor, I wish to emphasize that the Court's interpretation of the terms "govern" and "regulate" was limited to the specific context and purpose of that case, as noted at paragraph 43 of its decision. Specifically, the issue in *Ontario Harness Horse Association* was whether the Ontario Racing Commission's power to "govern" and "regulate" under s. 7 of the *Racing Commission Act, 2000* (S.O. 2000, c. 20) granted the Commission the authority to modify legal rights, including property rights, to some extent. Neither the facts nor the statutory framework considered by the Court in that case are relevant to the present matter and, therefore, provide no assistance to the grievor. For the reasons stated earlier, I do not accept that the mere fact that a performance award may, to a limited extent, alter the grievor's compensation is sufficient to conclude that the salary for the position to which he was appointed is governed by performance.

[77] I also reject the grievor's argument that his salary can be governed by both the lockstep pay system and the performance pay plan. His salary cannot simultaneously be "governed" by two systems because they function in fundamentally different ways. If performance pay is only a small percentage of the salary, then it cannot realistically "govern" alongside a lockstep pay scheme, which provides the majority of the salary and dictates the base progression.

[78] Considering that there is no ambiguity surrounding either the word “salary” or “governed”, I need not address the grievor’s argument based on the principle of *contra proferentem*.

[79] Based on all this, I conclude that it was not unreasonable for the employer to determine that the salary for the position to which the grievor has been appointed (i.e., LP-02) is not governed by performance pay. As a result, the employer did not breach clause 5.02 of the collective agreement.

[80] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[81] The grievance is denied.

December 13, 2024.

Adrian Bieniasiewicz,
a panel of the Federal Public Sector
Labour Relations and Employment Board